Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1570

WILLIAM CRAIG MILLIS and R. STEVE ACERS,
Appellants,

vs.

HIGH DRIVE WATER DISTRICT, a public corporation; BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; ROBERT E. MOORE and RICHARD M. GREEN,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

JOSEPH P. JENKINS
302 East Elkhorn Avenue
Estes Park, Colorado 80517
Attorney for Appellants

E. L. MERSENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8080

INDEX

OPINION BELOW 1

GROUNDS OF JURISDICTION OF SUPREME COURT 2

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED 3

QUESTIONS PRESENTED 6

STATEMENT OF THE CASE 7

SUBSTANTIALITY OF FEDERAL QUESTIONS 9

CONCLUSION 18

APPENDICES:

A. Opinion of United States District Court for the District of Colorado 19

B. Judgment 39

C. Notice of Appeal to the Supreme Court of the United States 40

D. Order Granting an Extension of Time to Docket Appeal 44

Index of Authorities

CASES

Carrington v. *Rash*, 380 U.S. 89 (1965) 13, 15

Dreyfus v. *First National Bank of Chicago*, 424 F.2d 1171 (7th Cir. 1970), *cert. den.* 400 U.S. 832 (1970) 9

Dunn v. *Blumstein*, 405 U.S. 1330 (1972) 13

First National Bank and Trust Co. v. *Ellwein*, 474 F.2d 933 (8th Cir. 1973) 9

Graham v. *Richardson*, 403 U.S. 365 (1971) 13
Kramer v. *Union Free School District*, 395 U.S. 621 (1969) 13
Lassiter v. *Northhampton Election Board*, 360 U.S. 45 (1959) 13
McLaughlin v. *State of Florida*, 379 U.S. 184 (1964) 17
Polk v. *Williams*, 193 U.S. 621 (1904) 13
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 13

CONSTITUTIONAL AMENDMENT AND STATUTES

Fourteenth Amendment to the Constitution of the United States 2, 3, 7, 9
28 U.S.C. § 1341 .....2, 5, 8, 17
28 U.S.C. § 1343(3) 2, 5, 8, 9, 17
28 U.S.C. § 1253 3
28 U.S.C. § 2284 2
42 U.S.C. § 1983 .....2, 6, 8, 17
C.R.S. 1973, § 32-1-101 .....4, 11
C.R.S. 1973, § 32-1-108 11
C.R.S. 1973, § 32-1-110 12
C.R.S. 1973, § 32-1-601 12
C.R.S. 1973, § 32-1-802 .....5, 10
C.R.S. 1973, § 32-1-802(3) 11
C.R.S. 1973, § 32-1-804(1) 11
C.R.S. 1973, § 32-1-804(4)(a) 11
C.R.S. 1973, § 32-1-811 11
C.R.S. 1973, §§ 32-3-123, 126 12
C.R.S. 1973, § 32-3-128 12
C.R.S. 1973, § 32-4-102 .....3, 11
C.R.S. 1973, § 32-4-104(1) 11

C.R.S. 1973, § 32-4-107(3) 11
C.R.S. 1973, § 32-4-107(5) 11
C.R.S. 1973, § 32-4-107(8) 13
C.R.S. 1973, §§ 32-4-113, 114, 115, 116 and 119 12
C.R.S. 1973, § 32-4-121 12
C.R.S. 1973, § 32-4-124(1) 11
C.R.S. 1973, § 34-4-101 *et seq.* 2
C.R.S. 1973, § 34-51-101 (Mining Districts) 14
C.R.S. 1973, § 35-70-105 (Soil Conservation Districts) 14
C.R.S. 1973, § 37-2-102 (Conservancy Districts) 14
C.R.S. 1973, § 37-42-101 (Irrigation Districts) 14

RULES

Rule 13(2), Rules of the Supreme Court of the United States 1
Rule 15, Rules of the Supreme Court of the United States 1

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

WILLIAM CRAIG MILLIS and R. STEVE ACERS,
Appellants,

vs.

HIGH DRIVE WATER DISTRICT, a public corporation; BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; ROBERT E. MOORE and RICHARD M. GREEN,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellants, William Craig Millis and R. Steve Acers, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered in this case by the United States District Court for the District of Colorado, and should exercise such jurisdiction herein.

OPINION BELOW

The opinion of the statutory three-judge court is unreported, and is included herein as Appendix A, pp. 19-38. The court held that the voting qualifications for the organization and operation of a water district pursuant to Colorado Revised Statutes (hereinafter referred to as C.R.S.) §§ 32-4-101, *et seq.*, are not violative of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. The court declined to exercise jurisdiction over appellants' claim for a permanent injunction under 28 U.S.C. § 1341, for relief under 42 U.S.C. § 1983, or for a declaratory judgment, and dismissed the action.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action under 28 U.S.C. § 1341 wherein the appellants, hereinafter referred to as the taxpayers, sought an order enjoining, suspending or restraining the assessment, levy, or collection of taxes to finance a water district bond issue, to redress the deprivation under Colorado statutes of their right to vote and participate in the formation, organization, operation, control, and financing of special districts, in this case, a water district, under 28 U.S.C. § 1343(3), and 42 U.S.C. § 1983, and for a declaratory judgment.

The memorandum opinion and order by a specially constituted three-judge panel, convened in the United States District Court for the District of Colorado under 28 U.S.C. § 2284, was entered on January 12, 1978. The final judgment was entered on January 13, 1978. (Appendix B, p. 39).

Notice of appeal on behalf of the taxpayers was filed on February 13, 1978, in the United States District Court for the District of Colorado. (Appendix C, pp. 40-43).

Time for docketing the appeal was extended by Mr. Justice Byron R. White to May 1, 1978, by an order entered April 10, 1978. (Appendix D, p. 44).

The jurisdiction of the Supreme Court of the United States to review the final judgment by a direct appeal is conferred by 28 U.S.C. § 1253.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

Fourteenth Amendment to the Constitution of the United States:

"*Citizenship defined—privileges of citizens.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

C.R.S. 1973, § 32-4-102:

"32-4-102. *Definitions.* As used in this part 1, unless the context otherwise requires: * * *

"(5) 'Taxpaying elector' and 'elector' of a district have the meanings, respectively, as specified in section 32-1-101. . . .

"(8) All elections provided for in this part 1 shall be governed by part 8 of article 1 of this title. Election officials shall require the execution of an affidavit by any person desiring to vote at any election of the district to evidence his qualifications to vote, which affidavit shall be prima facie evidence of the facts stated therein. Registration pursuant to the general election or any other statutes is not required."

Section 32-1-101:

"32-1-101. *Definitions.* * * *

"(1)(a) 'Elector' of a district means a person:

"(I) Who, at the designated time or event, is qualified to vote in general elections in this state;

"(II) Who has been a resident of the district or the area to be included in the district for not less than thirty-two days; or

"(III) Who, or whose spouse, owns taxable real or personal property within the district or the area to be included in the district, whether said person resides within the district or not.

"(b) 'Taxpaying elector' of a district means an elector of a district who, or whose spouse, owns taxable real or personal property within the district or the area to be included in the district, whether said person resides within the district or not.

"(c) A person who is obligated to pay general taxes under a contract to purchase real property within the district shall be considered an owner within the meaning of this subsection (1)."

The Colorado Special District Election Law, C.R.S. 1973, 32-1-802:

"*Definitions.* As used in this part 8, unless the context otherwise requires: * * *

"(3)(a) An 'elector' of a district, within the meaning of this part 8, is a person who, at the designated time or event, is qualified to vote in general elections in this state, and:

"(I) Who has been a resident of the district or the area to be included in the district for not less than thirty-two days; or

"(II) Who or whose spouse owns taxable real or personal property within the district or the area to be included in the district, whether said person resides within the district or not.

"(b) A person who is obligated to pay general taxes under a contract to purchase real property within the district shall be considered an owner within the meaning of this subsection (3)."

28 U.S.C. § 1341:

"*Taxes by States*: The district court shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. § 1343(3):

"*Civil rights and elective franchise*: The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

42 U.S.C. § 1983:

"*Civil action for deprivation of rights*: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

1. Under the special district statutes of the state of Colorado, the owners of taxable real and personal property located in a special service district are barred from voting, holding office, and participating in the organizing and operation of such district in any manner, if they reside outside the state, while persons who are qualified to vote in general elections in the state, who have lived in the district for at least thirty-two days *or* own taxable real and personal property in the district, but reside elsewhere in the state, may vote, hold office, and fully participate in the organizing and operation of such district; under such circumstances are the nonresident property owners denied equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Is such a classification bottomed on a compelling state interest? In the alternative, is there a rational basis for the classification?

STATEMENT OF THE CASE

The taxpayers are citizens and residents of the state of Texas who own taxable real and personal property located in the High Drive Water District in the county of Larimer, state of Colorado. High Drive Water District shall be hereinafter referred to as the District.

The District was organized according to the appropriate Colorado statutes. The provisions thereof are not important to this appeal except those relating to the right to vote, the question of formation and organizing the District, holding office on the District board of directors, incurring indebtedness, and the general operation of the District.

The District is located in an unincorporated area near Estes Park, Colorado, and was established for the purpose of furnishing domestic water to businesses and residences within its boundaries. It was created by an order and decree of the District Court of Larimer County, Colorado, on December 27, 1974. A board of directors was subsequently elected by the electors of the District. A bond issue was approved by the electors, but later revised to provide for a higher rate of interest with the statutory mandated approval of the Board of County Commissioners, appellants herein. The bonds have not been issued due to the pendency of this lawsuit.

Appellee, Robert E. Moore, is the duly elected and qualified treasurer of said county, and appellee, Richard M. Green, is the duly elected and qualified assessor thereof.

The taxpayers were denied the right to vote on the question of the formation of the District, on the bond issue, candidates for the District board of directors, and barred from any participation whatsoever in the affairs of the District. Admittedly, they can counsel with members of the board of directors, but are barred from nominating prospective members thereto, serving on the board themselves, or having any real voice in the District's affairs.

The taxpayers and two others filed an action in the District Court of Larimer County seeking state remedies and raising questions concerning the validity of the District based on constitutional arguments. It quickly became apparent that the state court would not consider the taxpayers' constitutional claims which resulted in the filing of this action in the United States District Court for the District of Colorado by the two taxpayers herein.[1]

The complaint is cast so as to pray for three claims of relief. In their first claim for relief, the taxpayers seek an order under 28 U.S.C. § 1341 enjoining, suspending, or restraining the assessment, levy, or collection of taxes in order to pay principal and interest on the bond issue, and other costs, expenses, or charges. The taxpayers' second claim for relief arises under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, to redress the deprivation of their

1. The state court entered an order on April 1, 1976, dismissing all claims attacking the organization of the District, and any claims that the Water District Act (Water and Sanitation District Act) or any part thereof is unconstitutional. The order was entered *sua sponte* although the appellees withdrew their motion to dismiss the taxpayers' constitutional claims.

right to vote and otherwise participate in the formation, organizing, operation, control, and financing of a special service district, the denial of which the taxpayers claim was a violation of the due process, privileges or immunities, and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The third claim for relief seeks a declaratory judgment.

A three-judge court was convened to hear the case. The action was dismissed.

The Attorney General of the State of Colorado, the Special District Association of Colorado, Willson & Lamm, bond attorneys, and the Colorado Municipal Bond Dealers Association, Inc., appeared as *amicus curiae*, and filed briefs in opposition to the taxpayers' claims.

SUBSTANTIALITY OF FEDERAL QUESTIONS

The District Court held that jurisdiction in this case is found in 28 U.S.C. § 1343(3) for the limited purpose of considering the constitutional question of the claims of denial of equal protection by the exclusion of the taxpayers from the qualified electorate. The court went on to state that to whatever extent there may be jurisdiction under any other claims or contentions of the taxpayers, they would abstain in favor of the courts of Colorado. *First National Bank and Trust Co.* v. *Ellwein*, 474 F.2d 933 (8th Cir. 1973); *Dreyfus* v. *First National Bank of Chicago*, 424 F.2d 1171 (7th Cir. 1970), *cert. den.* 400 U.S. 832 (1970).

A majority of the court held that there was no plain, speedy, or adequate remedy available in Colorado on the limited question.

It is submitted that while the court below refers to the question as a limited one, it is an issue of grave importance since it involves the disenfranchisement of a large percentage of property owners in a taxing district, and furthermore, this particular scheme of defining electors, which results in the exclusion of a certain class from the electorate, has never been before the Court.

The disenfranchisement is not confined to this water district, but to all special districts throughout the state of Colorado.[2]

The District is not a large one. It consists of 147 parcels of real estate. As of December 31, 1976, 14.97 percent of the tracts were owned and occupied by year-round residents, all of whom qualify as electors. 27.89 percent are owned by persons who reside elsewhere in the state of Colorado, and who also qualify as electors. The remainder, or 57.14 percent, are owned by nonresidents of the state of Colorado, and who are disqualified as electors.

The statutory scheme is somewhat confusing and repetitious. The Colorado Special District Election Law, C.R.S. 1973, § 32-1-802, defines an elector as a person who at the time of the election, is qualified to vote in

---

2. As of December 31, 1976, there were 713 special districts in the state governed by the said provisions defining electors. They are divided as follows:

Districts	Number
Fire	177
Hospital	27
Metropolitan	24
Metropolitan Recreation	27
Sanitary	148
Water	81
Water and Sanitation	157
Cemetery	72

general elections in the state, *and* who has been a resident of the District or area to be included in the District for not less than 32 days. If the person or his spouse owns taxable property in the District, whether real or personal, he and his wife still qualify as electors if he resides elsewhere in the state of Colorado, and is qualified to vote in general elections.

This definition applies to all special districts within the state.

The Water and Sanitation District Act, C.R.S. 1973, § 32-4-102, refers to the Special District Act, C.R.S. 1973, § 32-1-101, for the same definition of an elector.

The exclusion of this class of taxpayers has ramifications extending beyond the right to vote.

Only taxpaying electors can petition for the organization of a water district.[3] C.R.S. 1973, § 32-4-104(1). Participation in the election on the question of organization of a water district is limited to "electors" or "taxpaying electors". C.R.S. 1973, §§ 32-1-802(3) and 32-4-107(3). Only electors of the District may serve as election judges. C.R.S. 1973, §§ 32-1-804(1) and 32-4-107(3). Only electors may serve on the board of directors for the District and only electors may nominate persons for service on the board of directors. C.R.S. 1973, §§ 32-4-107(5), 32-1-804(4)(a) and 32-1-811. Only electors or taxpaying electors may vote at an election on the question of issuing bonds. C.R.S. 1973, §§ 32-4-124(1) and 32-1-108. The power to recall any person from the board of directors

---

3. The statutory scheme has differentiated between "taxpaying electors" and "electors", which simply means that taxpaying electors *must* own property in the District whether they reside in the District or not. It appears that an "elector" need only live in the District for 32 days and be eligible to vote in general state elections.

is limited to person who are electors of the District. C.R.S. 1973, § 32-1-110.

The taxpayers' property is subject to the exclusive control of the board of directors who are elected by qualified electors only, and have, among other such powers, the power to levy and collect taxes; to make levies to cover deficiencies; enter into contracts affecting the affairs of the District; to borrow money and incur indebtedness, and to evidence the same by certificates, notes or debentures; acquire, dispose of and encumber real and personal property, including water, water rights, and plants; to have the management, control, and supervision of all the business and affairs of the District; the power of eminent and dominant eminent domain; to fix water and service rates, and charges for services and facilities furnished by the District; to pledge revenue for the payment of any indebtedness of the District, plus all other rights and powers necessary or incidental to or to be implied from the specific powers granted. The board also has the power to levy taxes and collect revenues for a sinking fund to cover indebtedness of the District. (C.R.S. 1973, §§ 32-4-113, 114, 115, 116, and 119.)

Applications for exclusion from the District are heard and determined by the same board of directors. C.R.S. 1973, § 32-4-121.

The lower court did not mention two additional matters which exclude the taxpayers herein. Districts may be dissolved under C.R.S. 1973, 32-1-601, but only by a majority vote of the qualified electors. A majority of the taxpayers may petition for an election for elimination of land from a district, but objections thereto can only be made by a taxpaying elector. C.R.S. 1973, §§ 32-3-123, 126. Only electors can vote on the proposition. C.R.S. 1973, § 32-3-128.

The Water and Sanitation District Act goes so far as to provide that an order entered by a state district court establishing a district shall be deemed final, and no appeal or other remedy shall lie therefrom. C.R.S. 1973, § 32-4-107(8).

It must be emphasized that this appeal does not involve the right to vote in general elections, and the various cases dealing with durational and residency requirements in order to participate in such elections. *Polk* v. *Williams*, 193 U.S. 621 (1904); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Lassiter* v. *Northhampton Election Board*, 360 U.S. 45 (1959); *Dunn* v. *Blumstein*, 405 U.S. 1330 (1972).

The central core of this case is the classification which does not discriminate between residents and nonresidents of a special district, but between nonresidents and residents of the state of Colorado. Under an equal protection analysis, why should a nonresident property owner of the District, but a resident of the state, be enfranchised, while a nonresident property owner of the District who happens to be a nonresident of the state be disenfranchised?

The lower court pointed out that the strength of a governmental interest necessary to support a distinction under equal protection analysis depends upon the character of a classification and the nature of the individual interests affected by it. If the classification is made on a basis which is suspect or invidious, or if fundamental individual rights are involved, only a compelling state interest will suffice. A mere rational relationship or relevant basis would be enough for other classifications affecting other kinds of individual interest. *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

The court below conceded that there is no legislative history for the statute, nor did they know the particular reasons considered by the Colorado Assembly. Counsel for the District and *amicus curiae* were of no particular help in advancing a rational basis for the classification. It is submitted that such arguments as administrative convenience in identifying those who are entitled to vote; protection against fraud; the interrelationship between state and local finances; the opportunity to be aware of the issues in an election; and having an intelligent electorate with a real stake in the outcome, were spurious and sophistic arguments which added nothing to our store of knowledge as to why the classification was created. This is particularly so since a number of Colorado statutes relating to other types of districts do allow nonresidents to vote and have some degree of control over the operation of such districts.[4]

The court below having found that the classification was neither invidious nor suspect so that the existence of a compelling state interest was irrelevant, then turned to the rational relationship test. What they found most persuasive was an alleged common interest all Coloradoans share in the matter of urban development and protection of the environment. The allocation of a national resource was also considered. This allocation, as we read the opinion, is not an interest shared by residents of other states. No supporting decisions are cited, nor are there any. Of course, there is no legislative history, nor was any evidence offered to support the court's findings.

---

4. Mine drainage districts, C.R.S. 1973, § 34-51-101; conservancy districts, C.R.S. § 37-2-102; irrigation districts, C.R.S. 1973, § 37-42-101; soil conservation districts, C.R.S. 1973, § 35-70-105.

The lower court conceded that there is an element of unfairness in the specific application of the statute to the District, pointing out that a few year-round residents may be able to benefit themselves and their property at the expense of the majority of the owners who make only seasonal use of their property. But, the court would leave this matter to the courts of Colorado within the context of due process.

We submit that the classification has not been satisfactorily explored by the lower court, and that this Court should determine the substantial question of whether the classification is indeed suspect or invidious, or a deprivation of fundamental individual rights. Is there a "fencing out" of a section of the population because of the way they may vote? *Carrington* v. *Rash, supra.* In the alternative, the court should decide whether there is a rational relationship to a legitimate state interest. Review by this Court becomes even more imperative since the statutory scheme defining electors in special district elections is a unique one, and has never been passed upon by the Court.

We perceive no legitimate reason for the discrimination. The reasons advanced by the lower court lack substance and a careful reading of the opinion leads one to believe that the court lacked conviction. The owner of property in the District should be no less concerned with the surrounding area, the adequacy of a water supply, and protection of the environment. Why should he be disinterested in urban development? Why should a resident of Cheyenne, who lives approximately 90 miles from the District, be less interested in such matters than the property owner who lives in the southwest corner of the state of Colorado, 400 miles or so from the District?

Furthermore, under the questioned statutes, an elector need only own taxable real or personal property in the District. Such ownership will also qualify his spouse as an elector. As one of the district judges pointed out, a person could be a qualified elector by merely owning a desk in the District (and his spouse as well) while a person owning a $250,000.00 residence would be disqualified because of nonresidency. Would a person renting an apartment without any property ownership, but who had lived in the District 32 days, have more of an interest in urbanization, water allocation, and preservation of the environment, than a nonresident who may have owned property in the District for half a century? Furthermore, the apartment renter could serve on the board of directors and set policies binding on the hapless and frustrated nonresident property owner. We submit that the Court should decide whether the reasons for the finding of validity as against an equal protection attack are tenable and warrant judicial gloss.

Two other deficiencies in the Colorado statutes defining electors may be suggested: Nowhere do we find a provision defining corporate owners of property in the District as electors, nor are personal representatives of estates owning property therein so defined. Therefore, they are also barred.

There can be no doubt that the questions presented to the Court are substantial, affecting as it does, the right of nonresident property owners to be treated in the same manner in the voting process as are residents of the State of Colorado who also reside outside the District. Many special districts are involved, and many thousands of nonresident property owners, all with a substantial stake in the property, the environment, and who, realistically, should have some degree of control, or at least a voice

in how these special districts are organized, financed, and maintained. The Court has had to consider many statutory devices discriminating against or in some manner restricting the right of an individual or a segment of the population in the election and office holding process. This case is another in the long line of voting cases which persistently, depending on the ingenuity of the legislative and political mind, bring new equal protection problems before the Court. The matter of discrimination here is a simple one, and because of the statutes' brazen exclusion of nonresidents in favor of residents of the entire state, is suspect, invidious, and involves fundamental individual rights with no showing of a compelling state interest. Furthermore, even if the lower court is correct in discarding the compelling state interest test, it has not been shown that there is a rational relationship to a legitimate state interest for the classification.

McLaughlin v. *State of Florida*, 379 U.S. 184 (1964), teaches us that the courts must read and determine the question of whether the classifications drawn in a statute are reasonable in light of its purpose. We submit that no purpose has been shown here, and that an objective standard should be applied to determine whether nonresidents are arbitrarily being excluded from voting and participating in the affairs of the District.

We have not commented on 28 U.S.C. § 1341 and 42 U.S.C. § 1983, or with respect to the declaratory judgment claim. Invocation of 28 U.S.C. § 1343(3) would appear to be more than adequate for the purpose of determining the constitutional claim being raised herein.

CONCLUSION

For the reasons stated above, the taxpayers submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

JOSEPH P. JENKINS
302 East Elkhorn Avenue
Estes Park, Colorado 80517
Attorney for Appellants

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-M-1021

WILLIAM CRAIG MILLIS and R. STEVE ACERS,
Plaintiffs,

v.

HIGH DRIVE WATER DISTRICT, a public corporation; BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; ROBERT E. MOORE and RICHARD M. GREEN,
Defendants.

MEMORANDUM OPINION AND ORDER

(Filed January 12, 1978)

This three-judge court was convened, pursuant to 28 U.S.C. § 2284, to consider the plaintiffs' claim that the voting requirements of a Colorado statute authorizing the formation of a water district violate the Fourteenth Amendment to the United States Constitution. The relief requested is an injunction against the assessment, levy and collection of property taxes for the use and benefit of the High Drive Water District (District) and a declaratory judgment invalidating the statute and the District.

The District was organized according to the procedures established by C.R.S. 1973, §§ 32-4-101, *et seq.* The first step was the filing of a service plan with the County Commissioners of Larimer County, Colorado, proposing domestic water service for an unincorporated area

near the Town of Estes Park. Most of the development in the projected service area consists of summer residences owned by persons who are citizens and full-time residents of states other than Colorado. Only 15% of all of the parcels of real estate in the area are owned and occupied by year-round residents, who comprise approximately 11% of the total number of property owners. More than 50% of the parcels of property are owned by out-of-state residents and they comprise more than 50% of the total number of property owners.

After the commissioners' approval of the service plan, the formation of the District was approved by a vote of 27 to 21 electors at a special election for that purpose. The District Court for Larimer County, Colorado then entered an order and decree establishing the District as a quasi-municipal corporation, with municipal powers for the accomplishment of the limited municipal purpose of providing water. C.R.S. 1973, § 31-12-103(10) (1975 Cum. Supp.).

A second election was held to select a district board of directors. That board proposed the issuance of general obligation bonds to pay for the construction and installation of a domestic water system and that question was the subject of a third special election, with a favorable vote. Later, the service plan was modified to permit payment of a higher interest rate on the bonds, and, after a public hearing on the proposed modified plan, the county commissioners gave their approval. No bonds have yet been issued. The District has imposed a mill levy on all of the real property within it.

Only taxpaying electors can petition for the organization of a water district. C.R.S. 1973, § 32-4-104(1). Participation in the election on the question of organization of a water district is limited to "electors" or "taxpaying

electors". C.R.S. 1973, §§ 32-1-802(3) and 32-4-107(3). Only electors of the district may serve as election judges. C.R.S. 1973, §§ 32-1-804(1) and 32-4-107(3). Only electors may serve on the board of directors for the district and only electors may nominate persons for service on the board of directors. C.R.S. 1973, §§ 32-4-107(5), 32-1-804(4)(a) and 32-1-811. Only electors or taxpaying electors may vote at an election on the question of issuing bonds. C.R.S. 1973, §§ 32-4-124(1) and 32-1-108. The power to recall any person from the board of directors is limited to persons who are electors of the district. C.R.S. 1973, § 32-1-110.

The definitions of "elector" and "taxpaying elector" are found in C.R.S. 1973, § 32-1-101 (1976 Cum. Supp.) as follows:

> (1)(a) "Elector" of a district means a person who, at the designated time or event, is qualified to vote in general elections in this state and;
>
> (I) Who has been a resident of the district or the area to be included in the district for not less than thirty-two days; or
>
> (II) Who, or whose spouse, owns taxable real or personal property within the district or the area to be included in the district, whether said person resides within the district or not.
>
> (b) "Taxpaying elector" of a district means an elector of a district who, or whose spouse, owns taxable real or personal property within the district or the area to be included in the district, whether said person resides within the district or not.

The plaintiffs in this case are citizens and residents of Texas who own real property within the area of the

District. They and all other property owners who are not residents of the State of Colorado have been excluded from participation in the process of the formation of the District and they have been denied the vote in the elections which have been held. The plaintiffs claim this exclusion is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The plaintiffs also filed an action in the District Court in and for the County of Larimer, State of Colorado, seeking relief in the nature of certiorari and prohibition under Rule 106(a)(4), Colorado Rules of Civil Procedure, with respect to the formation and operation of the District. On April 1, 1976, that court ordered the dismissal of all claims for relief which attacked the organization of the District and of all claims for relief based upon the challenge to the constitutionality of the state statute under which the District was organized.

Jurisdiction in this matter is found in 28 U.S.C. § 1343(3) for the limited purpose of considering the constitutional question of the claim of denial of equal protection by the exclusion of the plaintiffs from the qualified electorate. To whatever extent there may be jurisdiction over any other claims and contentions of the plaintiffs, this Court will abstain in favor of the courts of Colorado. *First American Bank and Trust Co.* v. *Ellwein*, 474 F.2d 933 (8th Cir 1973); *Dreyfus* v. *First National Bank of Chicago*, 424 F.2d 1171 (7th Cir.), *cert. denied*, 400 U.S. 832 (1970).

28 U.S.C. § 1341 prohibits the injunction of an assessment, levy or collection of any tax under a state law where a plain, speedy and efficient remedy may be had in the courts of that state. That prohibition is not applicable here because the question presented is not the validity of a tax, it is the challenge to the creation of the

taxing authority. Moreover, there is no plain, speedy or adequate remedy available in Colorado on this limited question because the District Court in Larimer County has refused to consider it.

The Colorado General Assembly used a combination of interests to establish the requirements for qualification as an elector of a water district. All such electors must have sufficient residence in the State of Colorado to be able to participate in general elections in the state. Additionally, each elector must have a more particular or localized interest in the service area of the district. That requirement can be met either by residence in that area for 32 days or by the ownership of real or personal property within the district, and ownership by one's spouse is sufficient. The plaintiffs are not residents of the District. They are property owners. The requirement which is discriminatory as to them is the general qualification for voting in Colorado general elections.

The right to vote in state or local elections is not a privilege or immunity of United States citizenship. *Pope* v. *Williams*, 193 U.S. 621 (1904); *Snowden* v. *Hughes*, 321 U.S. 1, 7 (1944). The question, therefore, is not whether the plaintiffs have a federal constitutional right to vote; it is an issue of the legitimacy of the distinction between property owners who are Colorado residents and property owners who are citizens of the other states.

The character of the classification and the nature of the individual interests affected by it determine the degree of strength of the governmental interest necessary to support a distinction under equal protection analysis. If the classification is made on a basis which is "suspect" or "invidious" or if "fundamental" individual rights are involved, only a "compelling" state interest will suffice. A

mere "rational relationship" to a "legitimate" state interest will be enough for other classifications affecting other kinds of individual interests. *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1 (1973).

The subject of this lawsuit is not the suffrage of citizens in a political community. *Hill* v. *Stone*, 421 U.S. 289 (1975). The duration of the residency requirement is not involved. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). The concern here is only the difference between those District property owners who live in Colorado and those whose residence is in other states.

The classification of property owners by state residence is neither invidious nor suspect. The individual interest affected by the classification is the tax burden on property owned in Colorado. The plaintiffs are not prevented from owning property; they are prohibited from participation in the governmental processes affecting that property. It is a case of "taxation without representation". While that familiar phrase was a stated cause for the American Revolution, it does not describe any fundamental right or privilege either explicitly or implicitly recognized in the United States Constitution. *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1 (1973); *Shaffer* v. *Carter*, 252 U.S. 37 (1920). While property ownership may be the basis for distinguishing between Colorado residents where there is a limited governmental purpose and a disproportionate effect, *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), there is no constitutional requirement that every property owner must be entitled to vote in all elections which affect that property.

The narrow focus of the federal question presented by this case is whether there is any rational relationship to a legitimate Colorado state interest in the classification of landowners according to Colorado residency.

There is no legislative history for this statute. We do not know the particular reasons considered by the Colorado General Assembly. Several purposes have been suggested by counsel in this case. They include administrative convenience in identifying those who are entitled to vote; protection against fraud; the interrelationship between state and local finances; and the opportunity to be aware of the issues in the election. What is most persuasive here is the common interest which all Coloradans share in the matter of urban development and the protection of the environment. The provisions of a domestic water supply by the formation of a special purpose community is a step toward urbanization. It is also an allocation of a vital natural resource which affects all in the state. This is not an interest shared by residents of other states. It is, therefore, a rational relationship to a legitimate state interest which is sufficient to support the statutory discrimination which excludes the plaintiffs from voting.

It may be observed that there is an element of unfairness in the specific application of the statute to this District. Here, a few year-round residents may be able to benefit themselves and their property at the expense of the majority of the owners who make only a seasonal use of their properties. That, however, is not a matter for this Court. Having determined the facial validity of the Water District statute, we leave it to the courts of Colorado to consider all remaining issues concerning the Mile High Water District, including whether the specific application here constitutes a denial of any property right without due process of law.

Upon the foregoing, it is

ORDERED and ADJUDGED that the voting qualifications for the organization and operation of a water district pursuant to C.R.S. 1973, §§ 32-4-101, *et seq.*, are not violative of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, and it is

FURTHER ORDERED that this Court declines to exercise jurisdiction over the remaining issues raised by the amended complaint herein, and, accordingly, the Clerk of this Court is directed to enter judgment of dismissal, awarding the defendants' costs to be taxed.

DATED: January 12th, 1978.

By the Court:

/s/ Robert H. McWilliams
Circuit Judge
Sherman G. Finesilver
District Judge
/s/ Richard P. Matsch
District Judge

Judge Sherman G. Finesilver, dissenting.

Plaintiffs in this three-judge court action are citizens of the state of Texas who own real property in Larimer County, Colorado. In this lawsuit, as well as in a similar suit brought in the Colorado state courts, plaintiffs challenge the constitutionality of Colorado franchise statutes which prevent them from voting in Colorado water district elections.* Plaintiffs ask that this court declare

*Plaintiffs filed their complaint in the state court on September 9, 1975. Twenty days later, on September 29, 1975, a complaint was filed in this court. On April 1, 1976 the state court dismissed the constitutional claims. That ruling, upon final judgment, can be appealed through the state judicial system.

void as unconstitutional the formation of the High Drive Water District and all subsequent acts of its commissioners, and enjoin the assessment, levy and collection of all ad valorem property taxes and service fees enacted by the commissioners.

It is not necessary, however, to reach the merits of the controversy. This lawsuit is at its base, one to enjoin the collection of certain state taxes and, therefore, the district court lacks jurisdiction due to the Tax Injunction Act, 28 U.S.C. § 1341. Even assuming for the sake of argument that jurisdiction lies in this court, the court should abstain from reviewing this tax case as a matter of comity between federal and state courts.

I.

This case was presented to the court on a set of stipulated facts supplemented by certain exhibits introduced at the trial. Plaintiffs, citizens and residents of Texas, own summer homes in Larimer County, Colorado within the boundaries of the High Drive Water District. The District was formed under the provisions of 1973 Colorado Revised Statutes [1973 C.R.S.] §§ 32-4-101 *et seq.* Formation of the District and election of its Board of Commissioners was accomplished upon a vote of water district electors. Electors are defined at 1973 C.R.S. § 32-1-101 (a) and § 32-1-802(3). These statutes describe an elector as one who is qualified to vote in the Colorado general elections and who (a) has resided in the district for not less than 32 days at the time of the election, or (b) who, or whose spouse, owns taxable real or personal property within the district regardless of whether the person resides within the district. Because of this definition, only 42% of those who own realty within the District are eligible to vote in its elections.

The High Drive Water District was formed on December 27, 1974 after a favorable vote of the electors and state court approval of the election. On August 13, 1975, after some four months of public hearings, the Commissioners of the District approved a modified water service plan. The plan was to be financed through the sale of general obligation bonds and repayment of the bonds was through an ad valorem property tax. From the revenue raised through the bond sale homeowners within the District would enjoy water piped into their homes from a community water supply. This lawsuit was brought one month after the Commissioners approved the modified water service plan.

Plaintiffs' real concern is the imposition of the ad valorem property tax on their vacation property. That the gravamen of the complaint is the prevention of taxation is borne out by the form of the amended complaint. Plaintiffs' first claim for relief seeks in the alternative either that the "assessment, levy or collection of the taxes . . . be enjoined, suspended and restrained [or] that the provisions of said statutes relating to voting qualifications be declared unconstitutional." (Amended Complaint at 17) Plaintiffs additionally state that the relief sought is "the enjoining of the assessment and collection of taxes by state officials, and the declaring the involved statutes unconstitutional." (Amended Complaint at 15). During oral argument it became clear that plaintiffs' concern was that if the mill levy was upheld non-residents may be unable to maintain vacation residences in Larimer County.

II.

The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax

> under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

In the reported decisions in which the Tax Injunction Act has played a role, plaintiffs have charged that the subject tax violates, for example, the commerce clause of the Constitution [*Whitmore* v. *Bureau of Revenue*, 64 F. Supp. 911 (D. N.M. 1946), *aff'd per curiam sub nom. Whitmore* v. *Ormsbee*, 329 U.S. 668], or the due process and equal protection clauses [*Bland* v. *McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Green* v. *Klinkofe*, 422 F. Supp. 1021 (N.D. Ind. 1976)].

Like the typical due process complaints noted above, plaintiffs in this case attack, on constitutional grounds, the decisions and decision making process used in establishing the assessments. Plaintiffs also here contend that the creation of the water district itself constituted a violation of due process of law, and thus, any action taken by the Commissioners should be declared null.

The constitutional claims, which relate to privileges and immunities, due process and equal protection in the state franchise laws, are inextricably bound with plaintiffs' attempt to have this court enjoin the assessment, levy and collection of the property tax. Questioning the constitutional authority of the Commissioners, as distinct from the constitutionality of their procedures, is simply a legal expedient to avoid the effect of the Tax Injunction Act. Only by ignoring the substance of the lawsuit can one say that the question presented is the legality of a statutory scheme for the disenfranchisement of persons owning property within special service districts.

This court has previously been faced with a taxpayer's argument that his complaint did not violate the Tax Injunction Act because no "valid" tax had been assessed.

In *Kortz* v. *Ellington*, 181 F. Supp. 857 (D. Colo. 1960) (Arraz, J.), the court reviewed the charge that defendant's administration of the tax laws violated the due process clause. The court rejected the argument, saying:

> Plaintiffs claim that this provision is inapplicable because this was not a tax collection since it was a totally void proceeding. This reasoning is not supported by the cases. In Baker v. Atchison, T. & S.F. Ry. Co., 10 Cir., 106 F.2d 525, the claimed illegality of the tax did not prevent the Court from applying 28 U.S.C. § 1341. The only question remaining then is whether the Courts of Colorado will provide a plain, speedy and efficient remedy.

There is no significance to the distinction that in the precedents cited above the tax was claimed void for failure to follow constitutional procedures *after* the election of the taxing agents, while here the tax is claimed void for failure to follow constitutional procedures *before* the election of the taxing agents. The end result is the same: the suspension of the assessment, levy and collection of state taxes. The Tax Injunction Act plainly deprives this court of jurisdiction to consider the question as long as state avenues of redress remain open.

III.

(a)

A jurisdictional conflict is inherent in any constitutional attack on a state tax. The Tax Injunction Act specifically prohibits the federal court from enjoining assessment, levy or collection of a state tax where a plain, speedy and efficient state remedy exists. On the other hand, several statutes grant this court the power to hear constitutional challenges to state action. Nonetheless, in

recent years it has become clear that § 1341 serves as a limitation on federal jurisdiction. *See* Annotation, *Construction and Application of Federal Statute Prohibiting Federal District Courts from Interfering with Assessment, Levy, or Collection of State Taxes*, 17 L.ed 2d 1026 (1967) at § 5; Note, *Racial Discrimination and the Tax Injunction Act*, 90 Harv. L. Rev. 616 (1977) at 623 n.48. Although a constitutional violation may be undeniable, if the effect of a federal district court's ruling would be to restrain the collection of a state tax, the federal court must defer to any plain, speedy and efficient state procedure. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 n.6 (1972).

Both before and after *Lynch* other circuit and district courts have rejected claims that constitutional challenges, including cases brought under 42 U.S.C. § 1983, were exceptions to the § 1341 bar. *Miller* v. *Bauer*, 517 F.2d 27 (7th Cir. 1975); *Mandel* v. *Hutchinson*, 494 F.2d 364 (9th Cir. 1974); *Hickman* v. *Wujack*, 488 F.2d 875 (2d 875 (2d Cir. 1973); *Bland* v. *McHann, supra; American Commuters Assoc.* v. *Levitt*, 405 F.2d 1148 (2d Cir. 1969); *Kistner* v. *Milliken*, 432 F. Supp. 1001 (E.D. Mich. 1977); *Horn* v. *O'Cheskey*, 378 F. Supp. 1280 (D. N.M. 1974). The *Lynch* decision removed any doubt that in cases of statutory conflict, the limitation on jurisdiction contained in § 1341 prevails.

(b)

If the qualifying terms of §1341 are met, the federal court cannot *enjoin, suspend* or *restrain* the state taxing authority. Here the ultimate remedy plaintiffs seek is an injunction suspension or restraint on the collection of the tax. While plaintiffs may couch certain portions of their prayer in terms of declaratory relief, this is of no jural significance. It is well settled that under § 1341 no distinction is made between injunctive and declarative

relief. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299 (1943). More recently, Justice Brennan, concurring in *Perez* v. *Ledesma*, 401 U.S. 82, 128 n.17 (1971), reiterated the conclusion that federal courts should not issue declarations which would tend to restrain the collection of state taxes: "[T]he underlying policy of the anti-tax injunction statutes, 28 U.S.C. § 1341, relied upon in *Great Lakes*, bars all anticipatory federal adjudication in this field, not merely federal injunctions."

To the same effect are *King* v. *Sloane*, 545 F.2d 7 (6th Cir. 1976); *Aluminum Co. of Amer.* v. *Department of Treasury*, 522 F.2d 1120 (6th Cir. 1975); *Tennyson* v. *Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974); *American Commuters Assoc., supra; Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033 (1967); *City of Houston* v. *Standard-Triumph Motor Co.*, 347 F.2d 194 (5th Cir. 1965), *cert. denied*, 382 U.S. 974; *Aronoff* v. *Franchise Tax Board*, 348 F.2d 9 (9th Cir. 1965); *Kistner* v. *Milliken*, 432 F. Supp. 1001 (E.D. Mich. 1977); *Green* v. *Klinkofe, supra; Mandel* v. *Hutchinson*, 336 F. Supp. 772 (C.D. Calif. 1971), *aff'd* 494 F.2d 364 (9th Cir. 1974).

(c)

It may be questioned whether a mill levy on real property for a special water district constitutes a "tax under State law" within the meaning of the statute. The establishment of water and sanitation districts is provided for in the Colorado Revised Statutes of 1973 at §§ 32-4-101 *et seq*. Section 32-4-114 grants these districts the "power and authority to levy and collect ad valorem taxes." Additionally, § 32-4-123 specifically grants water district boards the power to issue general obligation bonds to cover expenses. The tax involved in this case is a "tax under state law." Other courts have similarly treated ad

valorem property taxes; *City of Houston* v. *Standard-Triumph Motor Co., supra; Henry* v. *Metropolitan Dade County*, 329 F.2d 780 (5th Cir. 1964); *Phipps* v. *School District*, 111 F.2d 393 (3rd Cir. 1940); *see also Tramel* v. *Schrader*, 505 F.2d 1310 (5th Cir. 1975) (Special Assessments).

(d)

Notwithstanding the previous discussion, §1341 does not serve as a jurisdictional bar unless "under State law . . . a plain, speedy and efficient remedy may be had in the courts of such State."* Any conclusion that a plain, speedy and efficient state remedy does not exist simply does not square with the facts or with legal precedent. To satisfy § 1341 the state remedy "need not necessarily be the best remedy available or even equal to or better than the remedy that might be available in federal court." C. Wright, *Handbook on the Law of Federal Courts* § 51 (3d ed. (1976). Satisfactory relief is available to plaintiffs in the state court and this court, therefore, lacks jurisdiction to consider the merits of the claims presented.

Colorado law provides a number of remedies to a taxpayer who claims he is subject to an unlawful assessment or levy. First, plaintiffs can bring an administrative

---

*The phrase "plain, speedy and efficient" was the result of Congress' attempt to more precisely define the concept courts had previously referred to by the phrase "plain, adequate and complete." *See*, Note, 51 Texas L. Rev. 999, 1000 (1973). The Supreme Court has considered the phrases as synonymous. *Tully* v. *Griffen*, 429 U.S. 68 (1976); *Hillsborough Township* v. *Cromwell*, 326 U.S. 620 (1946). Additionally the Johnson Act, 28 U.S.C. § 1343, prohibits federal restraints on state rate making bodies. It, like § 1341, carries the provision that a "plain, speedy and efficient" state remedy must be available and considerations made under either statute apply to both. *See*, C. Wright, *Handbook on the Law of Federal Courts* § 51 at 217 n.18 (3d ed. 1976); *Tennyson* v. *Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974); *see generally* Note, *The Johnson Act: Defining a Plain, Speedy and Efficient Remedy in the State Courts*, 50 Harv. L. Rev. 813 (1937).

action for an abatement of the taxes, or if already paid, for a refund. 1973 C.R.S. § 39-10-114. A hearing procedure to be followed by county commissioners in their determination of the legality of a tax is contained at 1973 C.R.S. 39-1-113. Finally, after a hearing the taxpayer is permitted to seek relief in the state district courts. Rule 106, Colorado Rules of Civil Procedure.

Colorado precedents make it clear that taxpayers do have judicial remedies for illegal levies. *Holly Sugar Corp.* v. *Board of Commissioners*, 10 F.2d 506 (10th Cir. 1926); *Canyon Crest Villas South* v. *Board of Commissioners*, 542 P.2d 395 (Colo. App. 1975); *Continental Oil Co.* v. *Board of Commissioners*, 498 P.2d 974 (Colo. App. 1972) (not selected for official publication). The subject matter of these procedures is not limited to the items enumerated in § 39-10-114 (*e.g.*, clerical error). Rather, the Colorado supreme court has extended the scope of such proceedings to illegality for any reason. In *Northcutt* v. *Burton*, 254 P.2d 1013 (1953) the state supreme court noted:

> The term "erroneous assessment" as used in this section, implies more than mere overassessment and refers to a tax levy that for any reason is wholly illegal or invalid.

Accordingly, plaintiffs can present their constitutional claims in administrative proceedings and then pursue appropriate remedies in the state courts, and finally, seek review in the Supreme Court of the United States.

Recently the Colorado supreme court decided a case having claims akin to those presented here. In *Chesser* v. *Buchanan*, 568 P.2d 39 (Colo. 1977), the court considered the claims of residents of the Moffat Tunnel Improvement District. Plaintiffs there claimed a denial of equal protection of the law because, not being owners of real property, they were prevented from voting in the election of district commissioners. There is no reason that plaintiffs here would not be afforded the same plain, speedy and efficient remedy afforded the plaintiffs in the *Chesser* disenfranchisement challenge.

It is true that the Colorado state trial court dismissed plaintiffs' constitutional claims. Because a court dismisses a party's contentions, however, does not mean that the party lacks a remedy before that judicial system. Plaintiffs retain the opportunity to appeal the decision of the state trial court. In other three-judge cases, this district has dismissed suits on jurisdictional grounds where the state's entire appellate procedure had not been pursued. *Mountain States Tel. & Tel. Co.* v. *Public Utilities Comm'n*, 324 F. Supp. 857 (D. Colo. 1971) (Lewis, C.J., Bratton & Chilson, JJ.); and again in *Mountain States Tel. & Tel. Co.* v. *Public Utilities Comm'n*, 345 F. Supp. 80 (D. Colo. 1972) (Doyle, Chilson & Finesilver, JJ.) (both Johnson Act cases). In a Tenth Circuit case, the Court of Appeals affirmed a dismissal where plaintiffs filed in federal court after having been denied relief by an administrative agency. The court noted that plaintiffs had the availability of appeal through the state court system and held: "From the foregoing it is clear that the plaintiffs have a plain, speedy and efficient remedy in the state courts." *Tennyson* v. *Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974) (Hill, Doyle & Smith, JJ.)

Yet another possibility exists for state redress. Plaintiffs could bring a suit in state court under the Civil Rights Act of 1871, 42 U.S.C. § 1981. The state courts have concurrent jurisdiction over these actions. *Long* v. *District of Columbia*, 469 F.2d 927 (D.C. Cir. 1972).

It is contended that all of the alternatives to federal suit are illusory in that each requires some sort of ad-

vance payment on the tax before relief will be granted. It has been held that if the taxpayer is unable to pay the tax or post the necessary bond, the remedy in state courts is not truly plain, speedy or efficient. *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F.2d 439 (7th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). Plaintiffs allege in their amended complaint that they would be unable to furnish a bond needed for state equitable relief. Plaintiffs, however, misconstrue the very nature of the equitable powers of the courts. If it indeed proves true that plaintiffs cannot afford the costs associated with a state restraining order, the state court may waive the bond requirement.

A plain, speedy and efficient state court remedy, as required by the Tax Injunction Act, exists in this case.

IV.

Notwithstanding the technical requirements of the Tax Injunction Act, the equitable doctrine which predates the statute warrants dismissal. It is clear that in enacting the Act, Congress was giving its approval to a pre-existing equity practice. *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976). The equitable practice of non-interference with the taxing practices of the states has developed beyond a matter of discretion—it is now considered an *obligation* of the federal courts. "A federal district court is under an *equitable duty* to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost." *Tully* v. *Griffin*, 429 U.S. 68, 73 (1976) (emphasis added). The Court in *Tully* went on to state:

> As the Court has frequently had occasion to note, the statute [28 U.S.C. § 1341] has roots in equity practice, in principles of federalism, and in recognition of the imperative need of a state to administer its own fiscal

> operations. "Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation". . . . *Great Lakes Dredge & Dock Co.* v. *Huffman*, [319 U.S.] at 298.

See also Matthews v. *Rogers*, 284 U.S. 521, 525 (1932).

The hesitancy to become involved in matters which would necessitate the suspension of state taxation was recognized at an early date by the Tenth Circuit Court of Appeals. In 1932 the court stated:

> . . . the federal courts should exercise an appropriate reluctance to interfere by injunction with the fiscal affairs of a state, and it is accepted practice to relinquish their jurisdiction in favor of the state courts in respect to such matters, if the federal rights of the complainant can be there preserved without impairment.

Baker v. *Atchison, T. & S.F. Ry. Co.*, *supra* at 529.

In *General Investment & Service Co.* v. *Wichita Water Co.*, 236 F.2d 464, 468 (10th Cir. 1956), the court dismissed a constitutional challenge to a water surcharge under the "well established . . . rule of comity." Dismissal also resulted in *Pudlik* v. *Public Service Co.*, 166 F. Supp. 921 (D. Colo. 1958) without consideration of the merits of the claims, in part because the state courts were available and the federal court recognized the advantage of a state determination which could be made on non-constitutional grounds. In all these actions the courts refused to become involved in constitutional challenges to taxes or agency rates where to do so would create unnecessary interference in state fiscal affairs.

Abstention was also deemed proper in *Dillon Companies, Inc.* v. *Board of Pharmacy*, unpublished, Civil Ac-

tion No. 74-F-83 (D. Colo. April 5, 1974) (McWilliams, Winner and Finesilver, JJ.). Although the especially sensitive area of state taxation was not there involved, the three-judge court declined to exercise jurisdiction on grounds of "equity, comity and federalism . . . so long as the state court case is proceeding with reasonable speed." Slip opinion at 7.

This equity doctrine is the basis for inclusion within the scope of § 1341 of certain actions which are not technically within its terms. For example, in *First National Bank* v. *Board of Commissioners*, 264 U.S. 450 (1924), the Court affirmed the dismissal of an action brought on constitutional grounds for refund of taxes paid. The question of suits for *refunds* is not addressed in § 1341. It is the equitable doctrine which precludes any federal review of refund cases where a state remedy is available. *Bland* v. *McHann, supra; Kistner* v. *Milliken, supra.* Likewise, actions for declaratory relief such as the instant case do not strictly fall within the language of the Tax Injunction Act. Nonetheless, where the declaratory lawsuit has the effect of suspending the assessment, levy or collection of taxes the federal courts, as has been discussed above, uniformly reject such cases.

These equitable factors pre-date the Tax Injunction Act and enrich its importance in federal-state relationships. In those cases which may not fit precisely within the contours of the Act the court should take cognizance of its equitable duty to decline jurisdiction. Novelty in pleading should not cause the courts to ignore the necessity to utilize state channels of redress when the relief sought is actually the suspension of a state tax. Form should not control over substance—a suit to enjoin the collection of a state tax is just that. The proper course here is to dismiss the lawsuit and allow it to proceed in the state forum.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-M-1021

WILLIAM CRAIG MILLIS and
R. STEVE ACERS,
Plaintiffs,

v.

HIGH DRIVE WATER DISTRICT, a public corporation; BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; ROBERT E. MOORE and RICHARD M. GREEN,
Defendants.

JUDGMENT

(Filed January 13, 1978)

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Robert H. McWilliams, Circuit Judge, United States Court of Appeals for the Tenth Circuit, and Richard P. Matsch, District Judge, United States District Court for the District of Colorado, and filed January 12, 1978, with an accompanying dissent by Sherman G. Finesilver, District Judge, United States District Court for the District of Colorado, it is

ORDERED that the action and complaint herein be and hereby are dismissed, and that the Defendants shall have its or their costs upon the filing of a bill of costs with the Clerk of this Court within ten days.

DATED at Denver, Colorado, this 13th day of January, 1978.

For the Court:

/s/ James R. Manspeaker, Clerk
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-M-1021

WILLIAM CRAIG MILLIS and
R. STEVE ACERS,
Plaintiffs,

vs.

HIGH DRIVE WATER DISTRICT, a public corporation; BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; ROBERT E. MOORE and RICHARD M. GREEN,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed February 13, 1978)

I.

Notice is hereby given that William Craig Millis and R. Steve Acers, the Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order dismissing their complaint entered in this action on January 12, 1978.

This appeal is taken pursuant to Title 28, United States Code, § 2101(a) sic (b).

II.

The Clerk will please prepare the transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Amended Complaint;
2. Answer to Amended Complaint;
3. Stipulation of Facts;
4. Exhibits A, B, C, D, E, G, H and I;
5. Memorandum Opinion and Order entered January 12, 1978.

III.

The following questions are presented by this appeal:

1. Whether C.R.S. 1973, Chapter 32, Article 1, Part 8, providing for special district elections; C.R.S. 1973, Chapter 32, Article 1, Part 2, the Special District Control Act; C.R.S. 1973, Chapter 32, Article 1, Part 1, containing general provisions relating to special districts such as the district involved in this action, and C.R.S. 1973, Chapter 32, Article 4, Part 1, relating to water and sanitation districts, and the provisions of said statutes relating to voting qualifications are unconstitutional and void in that they violate the due process, privileges or immunities, and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

2. Whether C.R.S. 1973, Chapter 32, Article 1, Part 8, providing for special district elections; C.R.S. 1973, Chapter 32, Article 1, Part 2, the Special District Control Act; C.R.S. 1973, Chapter 32, Article 1, Part 1, containing general provisions relating to special districts such as the district

involved in this action, and C.R.S. 1973, Chapter 32, Article 4, Part 1, relating to water and sanitation districts, and the provisions of said statutes relating to voting qualifications are unconstitutional and void in that they unlawfully discriminate between Colorado resident property owners and non-resident property owners in violation of the Fourteenth Amendment to the Constitution of the United States?

3. Whether the assessment, levy and collection of taxes by the Defendants for the use and benefit of the High Drive Water District should be enjoined, suspended and restrained as provided by Title 28, United States Code, § 1341?

4. Whether the District Court should redress the Plaintiffs' right to vote in any elections relating to the High Drive Water District by declaring that C.R.S. 1973, Chapter 32, Article 1, Part 8, providing for special district elections; C.R.S. 1973, Chapter 32, Article 1, Part 2, the Special District Control Act; C.R.S. 1973, Chapter 32, Article 1, Part 1, containing general provisions relating to special districts such as the district involved in this action, and C.R.S. 1973, Chapter 32, Article 4, Part 1; relating to water and sanitation districts and in particular the provisions of said statutes relating to voting qualifications, are unconstitutional and void as being in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Whether the District Court erred in failing to make and enter an adjudication under Title 28, United States Code, § 2201, declaring that the aforementioned statutes are unconstitutional and void as being in violation of the due process, privileges or immunities, and equal protection clauses of the Fourteenth Amendment to the Constitution

of the United States, and that any action taken thereunder to collect the described taxes from Plaintiffs be also declared unconstitutional and void for the reasons heretofore given.

Joseph P. Jenkins, P. C.
By /s/ Joseph P. Jenkins
Joseph P. Jenkins—Reg. No. 1947
302 E. Elkhorn Ave.-P.O. Box 1990
Estes Park, Colorado 80517
Telephone: (303) 586-2496
Attorney for Plaintiffs

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-854

WILLIAM CRAIG MILLIS, ET AL.,
Appellants,
v.
HIGH DRIVE WATER DISTRICT, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including May 1, 1978.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 10th day of April, 1978.